



United States General Accounting Office
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: Louisiana Clearwater, Inc.--Reconsideration and Costs

File: B-283081.4; B-283081.5

Date: April 14, 2000

Kai David Midboe, Esq., Midboe, Guirard, Davis, Melton and Tarpley, for the protester.

Edward Goldstein, Esq., U.S. Army Corps of Engineers, for the agency.

David A. Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Reimbursement of protest costs relating to protest of original evaluation and to protest of subsequent reevaluation, undertaken after prior protest of original evaluation led to corrective action, is recommended where agency's implementation of initial corrective action failed to address a meritorious issue clearly raised in the original protest, such that protester was put to the expense of protesting a second time on the same ground.

DECISION

Louisiana Clearwater, Inc. requests that we reconsider our decision of October 12, 1999 (B-283081.3), in which we dismissed Louisiana Clearwater's protest against the results of a reevaluation of proposals undertaken by the U.S. Army Corps of Engineers, which affirmed the award of a contract to Chem-Spray-South, Inc. (CSSI), under request for proposals (RFP) No. DACW29-99-R-0011 (RFP-0011), for aquatic vegetation control. In addition, Louisiana Clearwater requests that we recommend reimbursement of the costs of filing and pursuing its protest.

We deny the requests, but recommend reimbursement of the costs of filing and pursuing Louisiana Clearwater's protests.

On April 9, 1999, the Corps's New Orleans District issued RFP-0011 for aquatic vegetation control in Southern Louisiana through the application of liquid herbicidal materials. A contract was awarded to CSSI (on June 9), and Louisiana Clearwater filed a protest with our Office on June 23. In its protest, Louisiana Clearwater argued

in part that the Corps's evaluation of offerors' experience, the most important of the five technical evaluation factors, was inconsistent with the scoring approach set forth in the solicitation. Specifically, Louisiana Clearwater noted that the RFP required offerors to submit an "initial summarization" of their experience which

will be considered as the highest priority with the following subfactors carrying a weight of descending importance.

.

SUBFACTORS OF FACTOR 1. EXPERIENCE.

The following factors will be considered along with FACTOR 1, in their order of relative importance:

1. Federal Government contracts. . . .
2. State Government contracts. . . .
3. Local Government contracts. . . .
4. Commercial contracts or agreements. . . .

RFP § M.(ii). Louisiana Clearwater furnished with its protest a written statement from the Corps of the evaluation scores which confirmed that, as Louisiana Clearwater had been advised at its debriefing, the agency had accorded equal weight in the evaluation to each type of contract experience. Corps Letter to Counsel for Louisiana Clearwater (June 16, 1999). Louisiana Clearwater argued that this equal weighting was inconsistent with the solicitation statement that the types of experience were listed in descending order of importance, such that federal contract experience was more important than state experience, state experience more important than local government experience, and local government experience more important than commercial experience. In addition, Louisiana Clearwater asserted that the evaluation of proposals otherwise was unreasonable; that the agency improperly evaluated the awardee's ability to perform the contract; and that one of the evaluators and another agency official were biased against it.

By letter dated July 8, the Corps advised our Office that the contracting officer had "decided to take corrective action by conducting an independent re-evaluation of the proposals." Noting that Louisiana Clearwater had alleged bias on the part of an evaluator, the Corps stated as follows:

While the [contracting officer] has not concluded that the evaluation was anything less than impartial, she has recognized that the mere appearance of impropriety or impartiality can undermine the integrity

of the government procurement process Therefore, in an effort to remove any appearance that would tend to [compromise] the objectivity and impartiality of the procurement process in this case, the [contracting officer] has directed that personnel from the U.S. Army Engineer District, Jacksonville [Florida], perform an independent re-evaluation of the proposals in question.

Corps Letter to GAO 1 (July 8, 1999).

On July 12, our Office dismissed Louisiana Clearwater's June 23 protest on the basis that the agency's determination to perform an independent reevaluation of proposals using personnel from another engineering district rendered the protest academic (B-283081, July 12, 1999). Louisiana Clearwater subsequently informed our Office, in a July 16 request for reconsideration, that it had been advised by an agency employee from the New Orleans District that the Jacksonville District would also give equal weight to each type of experience. We denied the request for reconsideration on August 5. Although the protester asserted that this would perpetuate one of the deficiencies on which its protest had been based, we concluded that the mere anticipation of wrongful conduct on the part of evaluators participating in the new, independent evaluation did not provide a basis for reconsidering our decision that an agency determination to conduct an independent re-evaluation rendered a protest of the original evaluation academic. (B-283081.2, Aug. 5, 1999).

By letter dated August 23, the New Orleans District contracting officer advised offerors that, although Louisiana Clearwater's proposal had received the highest technical score in the reevaluation conducted by the Jacksonville District, the technical equality of the proposals was such that the difference between them did not warrant paying the significant cost premium associated with Louisiana Clearwater's proposal, and CSSI's low cost proposal therefore was deemed the most advantageous. On September 13, Louisiana Clearwater challenged the re-evaluation in a protest to our Office. Noting that it had been advised in its debriefing that the agency again had accorded equal weight in the evaluation to each type of contract experience, Louisiana Clearwater reiterated its argument that this was inconsistent with the solicitation statement that the types of experience were listed in descending order of importance.¹ In addition, Louisiana Clearwater argued that the New Orleans District was biased against it.

¹ The agency's written debriefing of Louisiana Clearwater indicated that its proposal had received all 5 possible points for federal contract experience, none of the 5 possible points for state experience, 3 of the 5 possible points for local government experience, and all 5 possible points for commercial experience. Post Award Debriefing of Louisiana Clearwater, Inc. at 1.

The Corps responded to Louisiana Clearwater's protest by letter of September 28, informing our Office of its intention to take corrective action. According to the Corps, "[t]he [contracting officer] confirmed that the Jacksonville evaluation team weighted each subfactor equally. . . . Because the evaluation team failed to weight these factors in descending order of importance, the [contracting officer] has decided to return the proposals to Jacksonville for further review." Corps Letter to GAO 1 (Sept. 28, 1999). In this regard, the letter advised that the contracting officer

has directed the evaluation team in Jacksonville to develop a point system that weights the subfactors in descending order of value With this point system in place, the evaluation team will translate their previous consensus evaluation scores into the new system so as to reflect their new weighted values. Once the new scores have been determined, Jacksonville will forward the scores to the [contracting officer]. The [contracting officer] will then make a best value determination based upon the new scores and the proposed prices and decide whether or not the award to [CSSI] should stand.

Id. at 1-2.

On October 12, we dismissed Louisiana Clearwater's September 13 protest on the basis that the Corps's conclusion that the reevaluation was inconsistent with the evaluation approach set forth in the solicitation, and its resulting decision to reevaluate proposals (using a Jacksonville District evaluation team) consistent with the stated evaluation approach--that is, in accordance with Louisiana Clearwater's interpretation of the solicitation--and decision to make a new best value determination, rendered Louisiana Clearwater's protest academic. Further, we noted that Louisiana Clearwater's argument (in a September 30 opposition to the Corps's motion to dismiss its protest)--that reevaluation by a Jacksonville District evaluation team would be insufficient to ensure fair and impartial treatment--merely anticipated improper agency action, and thus was speculative and premature, and that we will not question agency action on the basis of such speculation. See Ervin and Assocs., Inc., B-279161 et al., Apr. 20, 1998, 98-1 CPD ¶ 115 at 5; VSE Corp.--Recon. and Entitlement to Costs, B-258204.3, B-258204.4, Dec. 28, 1994, 94-2 CPD ¶ 260 at 2.

In its request for reconsideration of our dismissal of its September 13 protest, Louisiana Clearwater again argues that the Corps's proposed remedy--having a Jacksonville District evaluation team re-evaluate proposals consistent with the stated evaluation approach of weighting the experience subfactors in descending order of importance, and a new best value determination by the New Orleans District contracting officer--would not remedy the lack of fair and impartial treatment which Louisiana Clearwater allegedly has received from the New Orleans District.

To prevail on a request for reconsideration, the requesting party must either show that our decision contains errors of fact or law, or present information not

previously considered that warrants the decision's reversal or modification. 4 C.F.R. § 21.14(a) (1999); Department of Housing and Urban Dev.--Recon., B-279575.2, Nov. 4, 1998, 98-2 CPD ¶ 105 at 2; Department of the Army--Recon., B-271492.2, Nov. 27, 1996, 96-2 CPD ¶ 203 at 5. A request for reconsideration that, as here, reiterates arguments made previously and merely expresses disagreement with the prior decision does not meet the standard for granting reconsideration. Thermal Combustion Innovators, Inc.--Protest and Recon., B-279602.2, B-279602.3, Oct. 15, 1998, 98-2 CPD ¶ 94 at 4; Gordon R.A. Fishman--Recon., B- 257634.4, Sept. 9, 1996, 96-2 CPD ¶ 110 at 2-3. There thus is no basis for reconsidering our dismissal of the September 13 protest.²

Louisiana Clearwater also requests that we recommend reimbursement of the costs of filing and pursuing its protest. Our Bid Protest Regulations, 4 C.F.R. § 21.8(e), provide that where an agency takes corrective action in response to a protest, we may recommend that the agency pay protest costs, including attorneys' fees; however, we will make such a recommendation only where the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. CSL Birmingham Assocs.; IRS Partners--Birmingham--Entitlement to Costs, B-251931.4, B-251931.5, Aug. 29, 1994, 94-2 CPD ¶ 82 at 3.

We conclude that Louisiana Clearwater should be reimbursed its protest costs relating to both its September 13 protest and its original, June 23 protest.

² In any case, as we noted in our prior decision, contracting officials in negotiated procurements have broad discretion to take corrective action where the agency determines that such action is necessary to ensure fair and impartial competition, Patriot Contract Servs., LLC et al., B-278276.11 et al., Sept. 22, 1998, 98-2 CPD ¶ 77 at 4; Rockville Mailing Serv., Inc., B-270161.2, Apr. 10, 1996, 96-1 CPD ¶ 184 at 4, and we will not object to an agency's proposed corrective action where the agency reasonably concludes that the award was tainted by a flaw in the procurement process, so long as the corrective action proposed is appropriate to remedy the flaw. Aquidneck Sys. Int'l, Inc., B-257170.2, Sept. 30, 1999, 94-2 CPD ¶ 122 at 4-5. The action proposed here is appropriate to remedy the deficiency--the misvaluation of past performance--the agency has identified. Although the agency did not correct the problem as part of its corrective action in response to the original protest, it remains that we will not assume that the agency will act improperly in the future. It follows that Louisiana Clearwater's argument that the proposed reevaluation will not ensure fair and impartial treatment--which merely anticipates improper agency action--does not furnish a basis to question the adequacy of the proposed corrective action. Ervin and Assocs., Inc., *supra*; VSE Corp.--Recon. and Entitlement to Costs, *supra*.

We have recognized that the reimbursement of protest costs may be appropriate where an agency does not timely implement the promised corrective action that prompted the dismissal of a meritorious protest; as we have noted, the mere promise of corrective action, without reasonably prompt implementation, has the obvious effect of circumventing the goal of the bid protest system of effecting the economic and expeditious resolution of bid protests. Pemco Aeroplex, Inc.--Recon. and Costs, B-275587.5, B-275587.6, Oct. 14, 1997, 97-2 CPD ¶ 102 at 7-8; Commercial Energies, Inc.--Recon. and Costs, B-243718.2, Dec. 3, 1991, 91-2 CPD ¶ 499 at 6. Similarly, where, as here, an agency implements corrective action that fails to address a meritorious issue raised in the protest that prompted the corrective action, such that the protester is put to the expense of subsequently protesting the very same procurement deficiency, the agency action, even though promptly proposed, has precluded the timely, economical resolution of the protest.

When an agency proposes corrective action, we consider it implicit that it will undertake a good faith effort to address all issues raised by the protester that are meritorious. Louisiana Clearwater's June 23 protest of the Corps's failure to evaluate proposals consistent with the approach set forth in the solicitation was meritorious on its face; a contracting agency may not specify one evaluation approach in the solicitation and then, as here, evaluate proposals using a different approach. See Foundation Health Fed. Servs., Inc.; Humana Military Healthcare Servs., Inc., B-278189.3, B-278189.4, Feb. 4, 1998, 98-2 CPD ¶ 51 at 5-6. Thus, when the Corps proposed corrective action on July 8, there was every reason to assume that it would correct the discrepancy between the announced evaluation approach and the actual evaluation approach. The agency's failure to correct this deficiency constituted a failure to promptly implement its proposed corrective action, undermined the premise for our dismissal of Louisiana Clearwater's June 23 protest--that the agency would address apparently meritorious issues--and had the effect of requiring the protester to file a second protest, thereby defeating our goal of resolving protests economically and expeditiously. Accordingly, we think reimbursement of the costs incurred in connection with the original protest--which subsequent events have shown was not remedied by prompt corrective action--is warranted.

In addition, we think reimbursement of the costs incurred in connection with Louisiana Clearwater's September 13 protest also is warranted. While the agency proposed corrective action more than 2 weeks before the due date for the agency report in response to the September 13 protest, we do not think this is the appropriate measure of promptness under the circumstances. Rather, we think promptness must be determined in light of the fact that this corrective action is the same remedy we presumed was encompassed by the corrective action the agency proposed in response to the original protest. Considering this fact, and the fact that the agency's failure to implement the corrective action required Louisiana Clearwater to file a second protest, thereby defeating our goal of resolving protests economically and expeditiously, it is our view that the corrective action was not prompt.

In summary, we deny Louisiana Clearwater's request for reconsideration of the dismissal of its September 13 protest, but recommend reimbursement of its protest costs relating to the June 23 and September 13 protests. The protester's certified claim for costs, detailing the time spent and costs incurred, must be submitted to the agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

Comptroller General
of the United States